Office - Supreme Court, U.S.
FILED
DEC 14 1982
ALEXANDER L. STEVAS,
CLERK

Case No. 82-1019

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

QUALITY HEALTH SERVICE, INC., ET AL.,
Appellants,

vs.

WILLIAM W. JOHNSTON, CHAIRMAN,
INDUSTRIAL COMMISSION OF OHIO, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

GEOFFREY E. WEBSTER
Suite 2610
50 West Broad Street
Columbus, Ohio 43215
Phone: 614/461—1156

TERRY TATARU
137 E. Livingston Avenue
Columbus, Ohio 43215
Phone: 614/221—3821

Attorneys for Appellants

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

QUESTION PRESENTED

Whether, under standards set forth by this Court in *Lemon* v. *Kurtzman*, 407 U.S. 602 (1971), and *Califano* v. *Jobst*, 434 U.S. 47 (1977), the provisions of Section 4123.29 of the Ohio Revised Code, which requires the Industrial Commission to classify occupations or industries with respect to their degree of hazard, to determine the risks of the different classes and to fix the rates of premium to provide a fund for the compensation of workers provided for in Chapter 4123 of the Ohio Revised Code, are in violation of the Establishment and Equal Protection Clauses of the Constitution of the United States when applied so as to establish two classifications for nursing homes in Ohio, one class proprietary and the other class being affiliated with any religious organization and/or operating as a non-profit or philanthropic organization, with lower premiums required of a nursing home solely by reason of its affiliation with any church, when both proprietary and philanthropic nursing homes are licensed pursuant to Chapter 3271 of the Ohio Revised Code which sets forth no difference in building safety, equipment, furnishings, fixtures, staffing or any other standards to receive a license to operate.

PARTIES TO THE ACTION IN THE OHIO SUPREME COURT

The plaintiffs in this action in the Ohio Supreme Court were: Quality Health Services, Inc., Ethicare, Inc., and James D. Incorporated, all proprietary health care facilities located in Cincinnati, Ohio. In addition, the Common Pleas Court certified a class of plaintiffs consisting of all proprietary nursing homes which are presently or were within the applicable statute of limitations duly licensed and operating in the State of Ohio to provide nursing service through staff employed for that purpose and which are amenable to the Workers' Compensation Act of Ohio.

The defendants in this action, who were named in their official capacities, were William W. Johnston, Chairman of the Industrial Commission of Ohio; Raymond A. Conner, Vice-Chairman of the Industrial Commission of Ohio; Leonard T. Lancaster, Member of the Industrial Commission of Ohio; Robert C. Daugherty, Administrator of the Bureau of Workers' Compensation; the Industrial Commission of Ohio and the Bureau of Workers' Compensation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
PARTIES TO THE ACTION IN THE OHIO SUPREME COURT ii
INDEX TO AUTHORITIES v
OPINION BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS AND STATUTES 2
STATEMENT OF THE CASE 4
THE QUESTION IS SUBSTANTIAL 8
CONCLUSION 16
APPENDIX A
Judgment, dated September 15, 1982 of the Supreme Court of Ohio, Case No. 82 - 1044 ..... A-17
APPENDIX B
Judgment, filed May 25, 1982 of the Franklin County Court of Appeals, Case No. 81AP—324 ..... A-18
APPENDIX C
Decision, dated May 20, 1982, of the Franklin County Court of Appeals, Case No. 81AP—324 ..... A-19
APPENDIX D
Decision, dated January 5, 1981, of the Franklin County Common Pleas Court, Case No. 79CV—11—5606 ..... A-29

APPENDIX E
Findings of Fact and Conclusions of Law, filed March 6, 1981, of the Franklin County Common Pleas Court, Case No. 79–CV–11–5606 ..... A-35
APPENDIX F
Judgment Entry, filed March 20, 1981 of the Franklin County Common Pleas Court, Case No. 79CV–11–5606 ..... A-40
APPENDIX G
Notice of Appeal to the Supreme Court of the United States, filed November 5, 1982, Supreme Court of Ohio, Case No. 82–1044 ..... A-42
APPENDIX H
Article II, Section 35, Ohio Constitution A-45
APPENDIX I
Section 4121.131 Ohio Revised Code A-47
APPENDIX J
Section 4123.29, Ohio Revised Code A-48
APPENDIX K
Section 4123.34 Ohio Revised Code A-49

INDEX TO AUTHORITIES

Page

Cases:

Bell v. *Maryland*, 398 U.S. 226 (1964) 8

Califano v. *Jobst*, 434 U. S. 47 (1977) ..... i, 8

Conneticut General Life Ins. Co. v. *Johnson*, 303 U.S. 77 (1938) 8

Everson v. *Board of Education*, 330 U.S. 1 (1947) 13

Gulf, Colorado & Santa Fe Ry. v. *Ellis*, 165 U.S. 150 (1897) 8

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) ..... i, 13,15

Marshall v. *Andrew J. Mahoney Co.*, 56 F. 2d 74 (9th Cir. 1932) 11

Roemer v. *Board of Public Works*, 426 U.S. 736 (1976) 13

San Antonio School District v. *Rodriguez*, 411 U.S. (1973) 8

Santa Clara County v. *Southern Pac, Railroad Company*, 118 U. S. 394 (1886) 8

State, ex rel. Reaugh Const. Co. v. *Industrial Commission of Ohio*, 119 Ohio St. 206 (1928) 10

Walz v. *Tax Commission*, 397 U.S. 664 (1970) 13

Wheeling Steel Corp. v *Glander*, 337 U. S. 562 (1949) 8

STATUTES:

Section 4121.131, Ohio Revised Code 3, 9
Section 4123.29, Ohio Revised Code .....i, 3, 9
Section 4123.34, Ohio Revised Code 3, 9

CONSTITUTIONAL PROVISIONS:

First Amendment,
United States Constitution..... i, 2, 12, 13, 15
Section 1, Fourteenth Amendment,
United States Constitution..... i, 2, 8, 11, 12
Article II, Section 35,
Ohio Constitution 3, 8, 9, 10

JURISDICTIONAL STATEMENT

The appellants, Quality Health Services, Inc., respectfully submit this jurisdictional statement in support of their appeal of the decision of the Supreme Court of Ohio.

OPINION BELOW

The opinion of the Supreme Court of Ohio, dated September 15, 1982, appears in the appendix hereto, p. A-17, *infra.* This decision has not been reported.

JURISDICTION

This is a class action suit brought by the proprietary nursing homes in the State of Ohio against the Industrial Commission, its members, the Bureau of Workers' Compensation and the Administrator of the Bureau of Workers' Compensation.

The plaintiff-appellants sought declaratory and injunctive relief from the Franklin County Common Pleas Court. The basis of the claim is that the defendants and their predecessors in office have defined two classifications of nursing homes in Ohio; proprietary and church-related, or philanthropic, non-profit, and have set basic workers' compensation rates of contribution for employers that require a contribution from the proprietary nursing homes in excess of 200% above that required from the church-related or philanthropic, non-profit nursing homes; that this decision was made despite licensing requirements identical for both classes, and that this policy violates the equal protection and establishment clauses of the United States Constitution.

On January 5, 1981, the Court of Common Pleas ruled in favor of the defendants, and plaintiff-appellants appealed to the Court of Appeals, Tenth Appellate District of

Ohio, which ruled in favor of the defendants on May 25, 1982. Plaintiff-appellants then appealed to the Supreme Court of Ohio which, on September 15, 1982, *sua sponte* dismissed the appeal, holding that no substantial constitutional question existed.

Pursuant to the provisions of 28 U.S.C. Section 2101(c), a notice of appeal to this Court was duly filed in the Supreme Court of Ohio on November 15, 1982. See p. A-42, *infra*.

This appeal is being docketed within ninety days from the date of filing the notice of appeal and after entry of the judgment appealed from. The jurisdiction of this Court is invoked under 28 USC Section 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment, United States Constitution:

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1, Fourteenth Amendment, United States Constitution

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article II, Section 35, Ohio Constitution:

This section is set forth in the appendix hereto, p. A-45, *infra*.

Section 4121.131, Ohio Revised Code:

This statute is set forth in the appendix hereto, p. A-47, *infra*.

Section 4123.29, Ohio Revised Code:

This statute is set forth in the appendix hereto, p. A-48, *infra*.

Section 4123.34, Ohio Revised Code:

This statute is set forth in the appendix hereto, p. A-49, *infra*.

STATEMENT OF THE CASE

This case was initiated on November 16, 1979, by the filing of a complaint in the Franklin County Common Pleas Court. The plaintiffs, proprietary nursing homes in Ohio, requested declaratory and injunctive relief on the basis that the named defendants below had set basic premium rates of contribution to the Workers' Compensation fund for employers in proprietary nursing homes which were arbitrary and capricious and grossly disproportionate to other nursing home employers similarly situated and were unsupported and without reference to any previously done study, report, or other proof that their operation subjected employees to any risk greater than employees of philanthropic and/or non-profit nursing homes and that this method of classification violated the Equal Protection clause of the United States Constitution.

After discovery was initiated, plaintiff discovered that the sole criteria used for distinction in manual classifications between philanthropic and proprietary nursing homes was based on religious affiliations of the philanthropic and/or non-profit nursing homes, and with the court's permission amended its complaint to further allege that the classification practices of the named defendants violated the Establishment Clause of the United States Constitution. Thus, the question presented to this Court was first raised in the Court of Common Pleas by the filing of the complaint and the amended complaint.

At the trial, testimony established that the plaintiff-appellants are Ohio corporations organized for profit, and that they are duly licensed proprietary nursing homes who contribute to the defendant-appellees in an amount determined by the Workers' Compensation Act. The following base rate differentials were stipulated:

Year	Manual 9045 Proprietary N.H.	Manual 9062 Philanthropic N.H.
7-1-74	$2.90/$100.00 payroll	$1.12/$100.00 payroll
7-1-75	$3.21/ " "	$1.24/ " "
7-1-76	$4.17/ " "	$1.61/ " "
7-1-77	$5.42/ " "	$2.09/ " "
7-1-78	$4.33/ " "	$1.67/ " "
7-1-79	$3.60/ " "	$1.18/ " "

It was further stipulated that the Industrial Commission is required to classify occupations or industries with respect to their degree of hazard and to fix rates of premium to maintain a reasonable surplus fund. A manual classification signifies a particular group, by industry, with the same level of hazard. Each employer in that group therefore pays the same rate.

On February 15, 1979, a meeting was held by Mr. William Johnston, Chairman of the Ohio Industrial Commission concerning manual classifications. Prior to the meeting, non-profit and profit nursing homes had historically been classified under two separate manual numbers. There had been no study done to form a basis or justification for this dichotomy.

The actuarial section and underwriting section of the Bureau of Workers' Compensation are responsible for setting manual classifications and rates. At the February 15th meeting, Mr. Johnston decided there was no rational basis for the classifications and ordered that the two manual classifications (profit and non-profit nursing homes) were to be merged effective July 1, 1979. It was not until a concerted "lobbying" effort on behalf of the non-profit facilities that the decision to abolish the distinction was reversed.

After the controversy generated by the February 15th meeting, a purported study was conducted for the first

time ever to determine if there was a difference in the degree of hazard involved between proprietary and non-profit, religiously affiliated nursing homes. Although any study is open to interpretation, the defendants alleged before the trial court that the study would support a rate of contribution from employers in proprietary nursing homes of up to 50% more than the rate for religiously affiliated non-profit homes. This study, prepared in time to allow its introduction at trial, was the only evidence presented by defendants to support the unfavorable rate that has been levied against proprietary nursing home employers since the State Insurance Fund Manual was established seventy years ago. Defendants introduced no evidence to support the actual rate difference of two to three hundred percent. There are still no guidelines or formulae used in establishing the type of work or hazards involved; the classifications are still arbitrarily made on a case-by-case basis.

Both proprietary and religiously affiliated non-profit nursing homes are licensed pursuant to the identical standards contained in Chapter 3721, Chio Revised Code and the same regulations enacted thereunder. Yet the mere affiliation with a church automatically places a nursing home within Manual No. 9062, for which the lower premium rate is assessed. No study has ever been made to determine if there is any rational nexus between being a religious organization and receiving a lower premium contribution rate, nor has any legislative or psuedo-legislative body ever declared there is a secular purpose for this preferential treatment of nursing homes affiliated with religious organizations. Thus, plaintiff alleged at trial that both the Equal Protection clause and the Establishment clause of the United States Constitution were violated by this practice.

At the conclusion of the trial, both parties submitted

findings of facts and conclusions of law. Subsequently, the trial court found in favor of defendants-appellees, and further that the court did not have jurisdiction to enjoin the Industrial Commission. Therefore, the case was dismissed.

At the Court of Appeals, the plaintiffs-appellants' five assignments of error were overruled, and the judgment of the Franklin County Common Pleas Court was affirmed. The Supreme Court of Ohio, in its decision of September 15, 1982, *sua sponte* dismissed the appeal, holding that no substantial constitutional question existed. Plaintiff-appellants have timely filed a Notice of Appeal and are presently before this Court.

THE QUESTION IS SUBSTANTIAL

The Fourteenth Amendment to the United States Constitution guarantees equal protection which may not be denied "to any person". A corporation is a "person" within the meaning of that clause. *Santa Clara County* v. *Southern Pac, Railroad Company*, 118 U.S. 394, 396 (1886); *see, Bell* v. *Maryland*, 378 U.S. 226, 262 (1964) *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562 (1949); *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77 (1938).

The function of the Equal Protection clause is to measure the validity of classifications created by state laws. *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 59 (1973) (Stewart, J., concurring.)

To be consistent with equal protection, a classification must rest upon some difference that bears a reasonable relation to the act in respect to which the classification is proposed; mere arbitrary selection cannot be justified by being called classification. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U.S. 150, 155, 159 (1897). Likewise, legislation cannot be based upon distinctions which irrationally differentiate between identically situated persons. *Califano* v. *Jobst*, 434 U.S. 47, 53 (1977).

Article II, Sec. 35 of the Constitution of Ohio provides for the creation of a workers' compensation system in Ohio, which system calls for compulsory contributions by employers within the scope of applicable statutory provisions and is intended to pay compensation to employees injured in the course of their employment. Article II, Sec. 35 of the Constitution of Ohio, provides in part as follows:

> ". . . Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix

rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. . ."

Pursuant to Article II, Sec. 35, the General Assembly of the State of Ohio promulgated a statutory scheme for that system of workers' compensation including Sec. 4121. 131, Revised Code, which states, in part, the following:

> "The industrial commission, in addition to the specific powers, authority, and duties vested in and imposed upon it by section 4121.13 of the Revised Code, shall classify occupations or industries as provided in sections 4123.29 and 4123.31 of the Revised Code, fix rates and determine contributions as provided in sections 4123.34 and 4123.38 of the Revised Code. . ."

Section 4123.29, Revised Code, states in part as follows:

> "The industrial commission shall classify occupations or industries with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same, based upon the total payroll in each of said classes of occupation or industry sufficiently large to provide a fund for the compensation provided for in Chapter 4123 of the Revised Code, and to maintain a state insurance fund from year to year. . ."

Section 4123.34, Revised Code, states in pertinent part:

> "The industrial commission, in the exercise of the powers and discretion conferred upon it in Section 4123.29 of the Revised Code, shall fix and maintain, for each class of occupation, or

> industry, the lowest possible rates of premium consistent with the maintenance of a solvent state insurance fund and the creation and maintenance of a reasonable surplus, after the payment of legitimate claims. . ."

In summary, Article II, Sec. 35 of the Constitution of Ohio and the applicable statutory provisions quoted above require that the defendants, in operating a system of workers' compensation, determine the rate of premiums to be contributed to the state within a system of classifications of occupations and industries based upon the degree of hazard inherent in the employment. Basic premium rates must be the lowest possible to maintain solvency in the fund. The Supreme Court of Ohio in the case of *State ex rel Reaugh Const. Co.* v. *Industrial Commission of Ohio*, 119 Ohio St. 206 (1928), stated that:

> "Classification cannot be applied to an occupation or industry as an individual unit. The classification, contemplated by the Workers' Compensation Law. . . relates to occupations or industries as a class, operating generally under similar conditions . . ."

Evidence was presented before the trial court that there is no valid distinction between proprietary and non-profit, religiously affiliated nursing homes. The same licensing and certification standards exist for both groups. That is, both groups must meet the same building, safety, equipment, furniture, fixture, staffing and other standards to receive a license. This is clearly a case of "operating under similar conditions." The standard for setting rates is "the degree of hazard", Article II, Sec. 35 of the Ohio Constitution, *supra;* yet the determining factor used by the Industrial Commission in classifying nursing homes is the corporate structure, profit vs. non-profit, secular and pro-

prietary vs. religiously affiliated and philanthropic. As was shown at trial, there are no other similar classifications based on corporate or entity structure within the entire manual classification system of workers' compensation in Ohio. Plaintiff-appellants contend this is because reasonable minds could not believe that classifying by corporate structure, without more, is rationally related to a state end of providing protection for working people at the lowest feasible cost to the employer. The classification system rationally related to this end is the one mandated in the Ohio Constitution, a system which classifies based on degree of hazard to the employee. States may establish classifications without violating the Equal Protection Clause of the Fourteenth Amendment. However, once these classifications are determined upon specific findings of the hazards involved within an industry, classifications cannot be based on arbitrary distinctions having no rational relationship to the intended state ends. The Workers' Compensation Act, to be constitutional, must not be arbitrary, unreasonable, or fundamentally unjust or oppressive. *Marshall* v. *Andrew J. Mahoney Co.*, 56 F. 2d 74 (9th Cir. 1932). As was shown at the trial, defendants have, from July 1, 1974, and prior to that time, required plaintiffs and their class to contribute to the Workers' Compensation Fund at a discriminatory, unlawful, arbitrary and unreasonable rate bearing no relationship to the "degree of hazard" or risks inherent in the operation of a nursing care facility. Plaintiff-appellants have clearly established a violation of the equal protection clause beyond a reasonable doubt, and the trial court was in error not to conclude so.

Defendants prepared an after-the-fact study in the face of litigation in an attempt to justify the difference in the two manual classification. As was shown by the testimony, this study was not statistically valid, contained facts

and figures which were not verified or assimilated by anyone qualified to do so, and which purported to be a comparison between profit and non-profit nursing homes, but was instead a comparison of profit nursing homes with sundry groups, including non-profit nursing homes, Y.M.C.A.s, Boy Scouts, and other such organizations. Appellant contends this study must be seen as the scientifically useless sham which it is and should be ordered held for naught by this Court as a matter of law. Aside from this piece of alleged scientific research, there is absolutely no support for the classification based on corporate or entity structure.

Regardless of this Court's holding as to the proper effect of this "study", there is no evidence whatsoever indicating any rational basis for placing a nursing home in the favored manual classification solely because it is affiliated or becomes affiliated with a church or religious organization. To sustain the proposition that this classification is rational is to hold that reasonable minds could conclude that one of two identically situated nursing homes could be less hazardous solely because it is owned or purchased by a church. The testimony at trial was that a nursing home in the category discriminated against could and would be automatically placed in the favored category upon its affiliation with a religious organization. This is a classification without reason and violates the Equal Protection clause of the Constitution of the United States.

This automatic preference in rate given solely by reason of religious affiliation also violates the Establishment Clause of the Constitution of the United States. The Establishment Clause of the First Amendment to the United States Constitution provides that government shall neither prefer nor penalize religion. Neutrality on behalf of the government is required. The State must confine itself to secular objectives, and neither advance nor impede reli-

gious activity. *Roemer* v. *Board of Public Works*, 426 U.S. 736, 747 (1976). The Establishment Clause erects a "wall of separation between church and state." *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947). In setting up the wall between church and state, the Establishment Clause has been interpreted to protect against three main concerns: "sponsorship, financial support, and active involvement of the sovereign in religious activity."*Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970).

Appellant contends that the religiously affiliated nursing homes are so intrinsically imbibed with the purpose, practice and propagation of religion that the Court may take judicial notice that state aid to them is aid to religion. The nursing homes are a method by which religious societies may put their faith into practice. Religious instruction and the opportunity for patients to practice their faith and attend church services on the premises are a primary factor of many of these nursing homes. Many of these nursing homes are undoubtedly chosen by the potential patients for the very reason that they are church-affiliated. Certainly the good work done within these homes promotes both the religious beliefs of the staff and the particular church or religious society which operates them.

There are three tests a law must meet if it is challenged under the Establishment Clause: (1) the statute must have a secular legislative purpose; (2) the statute's primary effect must be one that neither advances nor inhibits religion; (3) the statute must not foster an escessive government entanglement with religion. *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971). The statute as here applied to the detriment of the appellant has no secular purpose; on the contrary, the undisputed testimony offered was that a nursing home could and would receive a more favorable classification solely due to its being

owned by a church or other religious organization. This is not a case of the state giving aid to the secular activities of a church; it is a case where an institution subject to the same licensing requirements and regulations as a proprietary nursing home is given a favorable classification without any finding or conclusion by the defendants except that the nursing home is a religious institution. There is then no secular purpose for this statute as applied.

The statute as applied has the primary effect of advancing religion. Every nursing home must have income exceeding its expenses if it is to survive. The state, in discriminating in favor of church related nursing homes by awarding them a favorable rate, is obviously reducing the expenses of those homes and directly contributing to their viability. As contended above, this Court may take judicial notice that state aid to these homes is state aid to religion.

In the case at hand, the testimony of Mildred Brady offered by way of deposition, clearly establishes an excessive government entanglement with religion in the classification scheme between proprietary and philanthropic nursing homes.

Mildred Brady was the Director of the Underwriting Section of the Bureau of Workers' Compensation during the period between 1977 and September, 1979. That particular section of the Bureau was responsible for determining what particular industries or occupations were assigned to particular manual classifications. Ms. Brady testified that virtually all non-profit nursing homes are affiliated with the church. She further testified that the church affiliation is the basis for the difference in manual classification between profit and non-profit nursing homes. Ms. Brady specifically testified that while she was Director of the Underwriting Section of the Bureau of Workers' Compensation, the basis upon which she would have determined classification was whether or not the particular

nursing home was associated with the church.

Clearly, the statute as applied against plaintiff-appellants fails all three sections of the test of *Lemon* v. *Kurtzman*, *supra*, and is violative of the Establishment Clause of the Constitution of the United States.

The decision of the Supreme Court of Ohio in this matter is erroneous and, it is submitted, should be reversed by this Court.

CONCLUSION

For the reasons set forth above, this Court should note probable jurisdiction of the appeal. Review by this Court will not only resolve the particular issues in this controversy, but also further illuminate the legal standard to be followed by courts in all future cases of this type.

Respectfully submitted,

Geoffrey E. Webster
Suite 2610
50 West Broad Street
Columbus, Ohio 43215
Phone: 614/461—1156

Terry Tatarú
137 E. Livingston Avenue
Columbus, Ohio 43215
Phone: 614/221—3821

Attorneys for Appellants